Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

NORMAN P. WEXLER,
DOING BUSINESS AS WEXLER AND WEXLER,

Petitioner,

v.

BIRGETTA A. DAVIS BOYD
and CHARLENE HARRISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the application of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq* ("FDCPA"), to a law firm's review of debtor's account and preparation and involvement in the issuance of a letter to a debtor in connection with attempted collection of a bad check. Respondents, while not quarreling arguing with the content or language of the letter, argued instead that Norman P. Wexler, doing business as Wexler & Wexler ("Wexler"), violated the FDCPA by not being "meaningfully involved" in reviewing that debtors file before issuing the debt collection letter. The United States District Court granted summary judgment in favor of Wexler. The Seventh Circuit Court of Appeals, in reversing the District Court's ruling, applied a different standard than that followed by any other court including, the other Circuits as to the level of attorney involvement.

Accordingly, this case involves a question of which standard applies to an attorney's involvement in sending out collection letters under the FDCPA. This case also involves a Constitutional issue of whether the Federal Courts can thwart the power of the Illinois Supreme Court and the State of Illinois in regulating the practice of law in Illinois and the time spent by lawyers on sending letters. The issues presented here are of critical importance to the debt collection industry and to the practice of law. This case presents the following questions:

1. Whether the Seventh Circuit Court of Appeals, in reversing the District Court's grant of summary judgment, heightened the standards for attorney involvement or review far beyond existing law and thus unduly expanded the Fair Debt Collection Practices Act, 15 U.S.C. §1693, *et seq*. ("FDCPA"), beyond the rulings of other courts.

2. Whether the Seventh Circuit's Court of Appeals' ruling, in effect mandating individual attorney reviews of a debtor's file, violates the Constitution and improperly thwarts the power of the State of Illinois to regulate attorneys in the practice of law in Illinois?

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No.

IN THE
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October Term, 2002

NORMAN P. WEXLER,
DOING BUSINESS AS WEXLER AND WEXLER,

Petitioner,

v.

BIRGETTA A. DAVIS BOYD
and CHARLENE HARRISON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Norman P. Wexler, d/b/a Wexler and Wexler by undersigned counsel, under appropriate rules of this Court, request that this court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is published at Boyd v. Wexler, 275 F.3d 642 (7th Cir. 2001). (A copy of the opinion is attached hereto as Appendix A). The opinion and judgment of the United States District Court for the Northern District of Illinois,

Eastern Division, which was reversed by the Seventh Circuit is unpublished as Boyd v. Wexler, 2000 WL 1727781 (N.D. Ill 2000). (A copy of said opinion is attached hereto as Appendix B). The District Court entered a Memorandum Opinion and Order granting summary judgment in favor of Petitioner on November 17, 2000. (Appendix B). On March 5, 2001, the District Court denied Respondent's Motion for Reconsideration. (A copy of said Memorandum Opinion and Order is attached hereto as Appendix C).

The Seventh Circuit Court of Appeals reversed the District Court's order. (Appendix A). On April 18, 2002, the Seventh Circuit Court of Appeals denied a Petition for Rehearing With Suggestion for Rehearing *En Banc*. (A copy of the Seventh Circuit's Order is attached hereto as Appendix D).

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Northern District of Illinois exists under 15 U.S.C. §1692 *et. seq*. The Opinion of the United States Court of Appeals for the Seventh Circuit was entered on December 28, 2001. A Petition for Rehearing With Suggestion For Rehearing *En Banc* was filed on January 10, 2002 and was denied on April 18, 2002. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692e(3), provides follows:

> § 1692e. False or misleading representations.
>
> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(3) The false representation of implication that any individual is an attorney or that any communication is from an attorney.

* * *

The United States Constitution provides, in pertinent part:

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall

be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the

states, are reserved to the states respectively, or to the people.

STATEMENT OF CASE

This case involves a class action lawsuit brought by purported consumers against Wexler under the Fair Debt Collection Practices Act, 15 U.S.C., § 1692, *et seq.* ("FDCPA"). The class action lawsuit alleges that Wexler violated the FDCPA by sending consumers collection letters signed in the name of the Wexler law firm. The named plaintiffs received letters from Wexler in connection with bad checks written to the law firm's clients, a casino and a finance company respectively.

Respondents filed a class action complaint in the United States District Court against Wexler alleging that Wexler sent collection letters using "official attorney letterhead" that allegedly violated the FDCPA. More specifically, Respondents alleged that Wexler had "no meaningful involvement" in the preparation or investigation of the accounts it was trying to collect and, in allegedly so doing, violated the FDCPA.

Wexler, in response to this charge, offered testimony which highlighted, detailed and outlined the particular procedures utilized by the law firm which demonstrated attorney involvement in the process. In addition, Wexler testified as to the direct and personal involvement of the law firm's attorneys with respect to the law firm's general procedures, as well as to every single debtor account.

Significantly, Respondents do not challenge the actual language of the letter but instead, the only claim against Wexler was that the letter "falsely" implied greater or more meaningful attorney involvement in the issuance of the letter. The FDCPA has been construed as prohibiting lawyers engaged in debt collection from "renting" their letterhead to collection agencies or allowing collection agencies to impersonate lawyers.

The District Court granted summary judgment in favor of Wexler based upon the unrefuted testimony and

documentary evidence of the Wexler lawyers including detailed testimony regarding the law firm's procedures and practices regarding debt collection and "log sheets" evidencing an attorney review of the individual debtor's file. The Court of Appeals reversed the decision of the District Court holding that a rational jury might have found that, based on the volume of mail sent by the attorney's firm, that it was unlikely that the attorney had actually reviewed debtor's files before authorizing the collection letters to be sent. However, as explained below, existing law did not require that the attorneys review each debtor's file but instead provides a lesser minimum standard.

Given the FDCPA's standards, as enunciated by various courts, whether the attorney did not review the individual debtor's file is simply not outcome determinative. This is especially true in light of the fact that here there was unrefuted and utterly unchallenged testimony that the attorney's meet the minimum standards of the FDCPA.

The Seventh Circuit focused exclusively upon the Respondents so-called "circumstantial evidence" which only attempts to challenge the testimony that individual reviews had been conducted. Therefore, the Court of Appeals, in finding that there was an issue of fact as to whether the attorneys had actually reviewed the individual debtor's, file applied a wrong and heightened standard under the FDCPA.

As such, the ruling is at odds with the holdings of the other courts including prior decisions of the Seventh Circuit. In addition, the ruling significantly expands the scope of the FDCPA and, in effect, impermissibly involves the Federal Government into the State of Illinois' function of regulating the practice of law in Illinois.

Wexler brought a motion for summary judgment wherein Wexler and other lawyers at the law firm testified that the law firm had specific procedures in place and that the lawyers were not only "personally" and "directly" involved in the approving of and issuing of the letters but that the lawyers had actually reviewed every single debtor's file before a collection letter was issued.

In their attempts to defeat the summary judgment, Respondents attached documents they had received pursuant to a subpoena from a vendor, Mail Sort, Inc. The documents appeared to show the numbers of letters sent by Wexler during given time periods. Respondents' lawyers argued that, based upon the "volume" of letters sent out on behalf of Wexler, the testimony of the Wexler lawyers regarding the reviews of each debtor's file "could not be true" given the high volume of letters sent. That was the only "evidence" or argument made by Respondents to counter the sworn testimony of the lawyers.

The District Court granted Wexler's motion for summary judgment and, after additional briefing, denied Plaintiffs' motion for reconsideration. An appeal followed. The Seventh Circuit reversed the District Court's ruling. 275 F.3d 642 (7th Cir. 2001).

REASONS FOR GRANTING WRIT

This case presents compelling questions of federal law regarding the interpretation of the FDCPA as it applies to lawyers. The case, which involves a question over which the Court of Appeals are no longer in agreement, centers upon the Seventh Circuit Court of Appeals' radical departure from established law which grossly expands the FDCPA. This case also involves an important question of expanding the FDCPA into the province of the State's right to regulate the practice of law, thus implicating Constitutional concerns.

A. THE SEVENTH CIRCUIT APPLIED A DIFFERENT AND HEIGHTENED STANDARD WHICH CONFLICTS WITH ITS OWN AND OTHER CITCUITS PRIOR HOLDINGS

The Seventh Circuit, in rendering its decision, noted the pre-trial discovery in the case had revealed that in an eight-and a-half month period Wexler's firm sent out 439,606 pieces of mail, which according to the deposition testimony of one of the firm's lawyers consisted overwhelmingly of "collection letters". Testimony in the record showed that by the term "collection letters" encompassed numerous follow-

up letters. In addition, the number of mail parcels sent includes all mail for the law firm including the payment of bills, payments to clients, receipts, pleadings and so forth. The District Court had found that the "mathematical inferences" about the volumes of letters sent could not raise an issue of credibility simply because they presented an alternative theory. (Appendix B).

The District Court reiterated that the Respondents did not submit any "affirmative evidence" directly contradicting Wexler's testimony that he or other attorneys at the firm meaningfully participated in the sending of Respondents' debt collection letters despite having ample opportunity to obtain discovery on this very issue. It was noted that Wexler's practice involves almost entirely the collection of bad checks. As such, the reviews generally include one piece of paper—the check which was returned unpaid.

Wexler respectfully submits that, in so ruling, the Seventh Circuit applied the incorrect legal standard. In addition, the Seventh Circuit, in so ruling, appeared to adopt a 15-minute time requirement on attorney reviews. (Appendix A). Congress never established such a time-requirement. Moreover, prior to this case, no court had ever so broadly expanded the FDCPA and set such a time-requirement.

The Seventh Circuit's ruling, in effect, transforms the Federal Courts into keepers of stopwatches upon lawyers in Illinois as they attempt to perform their professional duties in their offices. In addition, the ruling is rather perplexing in that it, in effect, anoints the Federal Courts as an unofficial regulatory agency overseeing the conduct of collection lawyers. This ruling creates nothing less than an unprecedented expansion of the Federal Courts into the regulation of the practice of law.

Prior to this ruling, the Seventh Circuit and all other Circuits had never demanded or mandated that a lawyer must review every debtor's file before issuing a collection letter so as to be in compliance with the FDCPA. See, e.g., Avila v. Rubin, 84 F. 3d 222, 228-229 (7th Cir. 1996). The Court of Appeals' ruling in this case is premised upon an acceptance

of the so-called circumstantial evidence as creating a material issue of fact. However, even *if* the "circumstantial evidence" was to be accepted and a factual issue where to exist as to whether Wexler reviewed each file, that fact is simply not outcome determinative.

The Court of Appeals' ruling significantly broadens the FDCPA beyond any existing law and in the process now allows the Federal Courts to regulate how long attorneys in Illinois should spend in reviewing a debtor's file in deciding whether a letter should be sent on behalf of its client regarding collection of the bad check debt. The FDCPA, despite its broad remedial purpose, cannot be so broadly expanded as to permit the Federal Government to, in effect, place stopwatches on Illinois lawyers as they determine whether to send a debtor a letter on a bad check.[1]

The Seventh Circuit's discussion of a 15 minute time limit is even more inappropriate given that the collection of a bad check does not typically involve extensive documentation. Under this ruling, a collection lawyer would be required to spend a set amount of time examining a bad check and the stamp indicating insufficient funds before sending a letter.

If the time-limit is imposed, would efficient and seasoned collection lawyers be required to spend a certain amount of time examining the check? To the extent collection efforts would undoubtedly become significantly more costly, who would ultimately bear these costs? Arguably the innocent consumer, as well as the offending bad-check writer would bear some of these costs as most states permit awards of attorney's fees in bad check collection cases. The adoption of a 15 minute time limit would not only seriously overburden the Federal Court system but would adversely affect lawyers, creditors, and consumers.

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[1] While it is one thing to legislate about letters that purportedly abuse consumers, it is quite another for the Federal Courts to actually regulate the time spent by an attorney on reviewing a debtor's file.

1. History: Under Established Law, An Individual Review Of A Debtor's File Was *Not* Mandated In Order To Meet The Standards Of A "Meaningful Review" Under The FDCP

The FDCPA prohibits a debt collector to "use any false, deceptive, or misleading representation or means in connection with the collection of a debt." 15 U.S.C. §1692e, including "the false representation or implication that any individual is an attorney or that any communication is from an attorney." 15 U.S.C. §1692e(3). Hence, a lawyer who merely "rents" his letterhead to a collection agency violates the FDCPA. See, Taylor v. Perrin Landry de Launay & Durand, 103 F.3d 123 2, 1235-38 (5th Cir. 1997).

In the leading case on the issue, Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993), the United States Court of Appeals for the Second Circuit found that an attorney who was employed by a collection agency on a part-time basis as general counsel had violated the FDCPA by allowing his facsimile signature to be used on correspondence on the collection agency's letterhead wherein he had no personal involvement in the matter. The Clomon court, in holding the attorney liable under § 1692 of the FDCPA, reasoned that that the attorney did not review each debtor's file, did not determine when particular letters should be sent, did not approve the sending of particular letters, did not see particular letters before they were sent, did not even know the identities of the persons to whom the letters were issued. Id. at 1320. In Clomon, it was essentially undisputed that the attorney had basically just sold his facsimile signature to bolster his collection agency employer's letters without actually intending to pursue litigation if necessary.[2]

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[2] Here, in stark contrast, Wexler operates as a law firm and has undisputed and well-established procedures in place to review the debtor's debt and claim information and to review every letter sent to the debtors. The District Court, in ruling on the motion for summary judgment, examined Wexler's procedures for reviewing the files and found it was undisputed that the "attorneys review and approve all letters before they are mailed and retain the discretion to decide whether to send out the collection letter at all."

After Clomon, the United States Court of Appeals for the Seventh Circuit addressed the issue in Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996). The Seventh Circuit, in Avila, ultimately found that a particular letter was not from a lawyer in a meaningful sense because the lawyer's business interest in the collection agency meant that he was not really acting as an independent lawyer to collect a debt. The Seventh Circuit found that, in addition to the lawyer's lack of involvement in sending out of the letter, a letter was not from the lawyer in a "meaningful sense" because the lawyer and the "referring" collection agency had a "cozy relationship." Id. at 228.

As such, the Seventh Circuit reasoned that a "real attorney" in the collection of the debt was rendering "no true independent judgment". Id. at 228.

In ruling against the defendant lawyer in Avila, the Seventh Circuit made several critical findings that are easily distinguishable from the present case. In Avila, the court reasoned that: "(1) Rubin [the lawyer] founded the collection agency; (2) Rubin owned 80 percent of the collection agency's corporate stock; (3) Rubin's son was the collection agency's president; (4) Rubin was chief executive officer of the collection agency; (5) Rubin drew a large salary from the collection agency; (6) Rubin had previously managed the day to day operations of the collection agency; (7) Rubin's office was located on the third floor of the collection agency's building." Id. at 224.

In fact, the Avila court, having been so persuaded by the interrelationship and lack of independence on the part of the lawyer, noted that the lawyer and collection agency were as "closely intertwined as lovers during an embrace." Id. at 222-224. In this case, there is absolutely no such evidence nor was any such allegation even made in this case.

Here, the District Court, in ruling for Wexler, expressly stated that it was adhering to the "guidelines set forth by the Seventh Circuit in Avila." In Avila, the Court held

that § 1692e requires "direct and personal involvement" by an attorney sending debt collection letters. Avila, 84 F.3d at 228. The Avila court explained that personal involvement "may include reviewing the file of individual debtors to determine if and when a letter should be sent or approving the sending of letters based on the recommendations of others." Id. A lawyer must at least pass upon an approved correspondence that purports to come from him. Id. at 229. The District Court correctly found that Wexler had established that he was "directly" and "personally" involved in collecting debts from Plaintiffs, and that Wexler and Wexler follows detailed debt collection procedures.

Respondents failed to come forward with any factual support for their conclusory allegations that come anywhere near the factual claims made in Clomon or Avila. For example, Respondents do not even allege that Wexler, like the attorney in Avila, owned 80 percent of the corporate stock and managed the day-to-day operations of the collection agency, etc. On the contrary, the two Respondents themselves had debts from two different creditor clients (Future Finance and Empress Casino respectively) and thus Wexler is not simply alter ego of the client as in Avila.

Here, in radical contrast to both Clomon and Avila, the unrefuted evidence showed that Wexler operates only as a law firm, has numerous litigation cases and pursued the debt collection on behalf of separate clients. Thus, it cannot be seriously asserted that Wexler is so interrelated with its clients so as to render the judgments of its attorneys ineffective. Unlike the lawyer in Avila, there are no allegations or facts to, in any way, to support the notion that Wexler was the alter ego of its different clients, Empress Casino or Future Finance. Nor can it seriously be alleged that Wexler was so interrelated to the Empress Casino or Future Finance so as to be "lovers in an embrace" as in Avila.

A number of courts have followed Clomon and Avila and have held that dunning letters, printed on attorney letterhead, violated the FDCPA when they falsely represent that they were actual communications from attorneys. In each of these cases, the attorneys had no involvement

whatsoever with the individual file actually being collected. The attorneys were, in essence, unlawfully selling their names to collection firms to help facilitate the collection of debts.

After carefully reviewing the relevant case law, the District Court here correctly concluded that: "[p]laintiffs mistakenly rely on Avila, 84 F.3d 222, Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993), to support their position."

2. The FDCPA Does Not And Should Not Demand A Lengthy Attorney Review

The law, as articulated in Avila v. Rubin, 84 F. 3d 222 (7th Cir. 1996); Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997) ("Heintz II"), and their progeny, does not and has not required or mandated that a lawyer must review each debtor's file. All that the law requires is that the attorney be "personally" and "directly" involved in the issuance of the letters. Id. at 228-229.

The United States Court of Appeals for the Seventh Circuit in Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996), held that § 1692e of the FDCPA requires "direct and personal involvement" by an attorney sending debt collection letters. Avila, 84 F.3d at 228. The Avila Court explained that personal involvement "***may*** include reviewing the file of individual debtors to determine if and when a letter should be sent ***or*** approving the sending of letters based on the recommendations of others." Id. (emphasis added).

In Jenkins v. Heintz, 124 F.3d 824, 834 (7th Cir. 1997) ("Heintz II"), the Majority found that the defendant lawyers had offered unrebutted evidence of the procedures they had followed when preparing to file suit to collect a debt so as to avoid errors and omissions that could result in an FDCPA violation. In Heintz II, the court specifically rejected the plaintiff's attempts to "set the bar much higher" requiring the debt collectors to investigate the charge for which recovery is sought and to routinely investigate and evaluate the legal liability of the debtor for charges imposed by the defendant's

clients. Id. at 834.[3] As such, the Seventh circuit's decision is at odds with the Court's decision in Heintz II.

All that the law requires is that the attorney is "directly" and "personally" involved in issuing the letters. Avila, 84 F.3d at 228. Here, as recognized by the District Court, this attorney review was not for an ERISA or RICO case or some other significantly complex legal matter but instead this case involved an attorney review of a bad check. It essentially entailed examining two sides of one document.

Wexler, in attempting to establish that he complied with the FDCPA, actually produced evidence that he not only compiled with the FDCPA, but that he had also, in effect, "raised the bar" so to speak as he and other firm attorneys testified that they had complied with his firm's established procedures and that he, or other lawyers in the firm, had actually reviewed each file. Here, the critical point is that the Respondents' only attacked and challenged that the debtor files could not have all been reviewed due to their volume.

As such, Respondents' circumstantial evidence was presented to challenge the issue of whether Wexler's lawyers reviewed each debtor's file. However, that is simply not the proper legal standard as enunciated by the Seventh Circuit in Avila and in Heintz II.[4]

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[3] The Heintz II Court, in rejecting the heightened standard, noted that "Congress in the FDCPA and the Supreme Court in its opinion had placed lawyers and lay debt collectors on equal footing." Id. at 832.

[4] Moreover, no attorney of the law firm testified contrary to the affidavit and as no lay collector, paralegal or secretary testified contrary to the affidavit.

3. Even If The Court Chose Not to Believe Wexler About The Individual Reviews, The Standard Is Not That An Individual Review Must Be Conducted But Instead Only Requires That The Attorney Be Directly And Personally Involved

The legal standard does not require as much involvement as Wexler testified that he provided. Hence, even *if* it were somehow proven that Wexler was unable to review each file, it does not refute, discredit or diminish the testimony that the Wexler law firm utilized certain procedures and that Wexler was personally and directly involved in the issuance of the letters.

Therefore, the Court of Appeals' finding that a fact issue existed as whether Wexler reviewed each file should not defeat summary judgment unless the Seventh Circuit is also concluding that an individual review was necessary. In so doing, the Seventh Circuit's opinion conflicts with existing case law. The fact of whether Wexler did or did not do more than was required should not resolve the issue in this case - namely was an attorney directly and personally involved in the issuance of the letters.

In other words, even if the Court were to fully accept Respondents' circumstantial evidence and find that Wexler and the other attorneys at the Wexler law firm had, in fact, either all lied or had all been mistaken as to whether they reviewed each debtor's file, Respondents never produced any evidence whatsoever (affirmative, direct or circumstantial) that challenges or refutes that Wexler had procedures in place that demonstrate minimum compliance with the FDCPA regardless of whether individual reviews are conducted. As such, the Court of Appeals applied the wrong FDCPA standard for attorney reviews in finding that a dispute regarding whether individual review had taken place was the outcome determinative issue. The Seventh Circuit's ruling imposes additional requirements upon lawyers that go far beyond existing case law, as well as what Congress, has mandated.

B. THE COURT OF APPEALS' APPARENT ACCEPTANCE OF RESPONDENTS' "MATHEMATICAL INFERENCES" LEADS TO AN UNPRECEDENTED EXPANSION OF THE FDCPA

The Respondents' only basis for attempting to refute the testimony of the Wexler lawyers was the "mathematical" theory for liability. Wexler, in turn, asserted that the mathematical formula relied upon by the Plaintiff was faulty. The Court of Appeals, in accepting the mathematical formula, adopts a minimum to the standard for review, which grossly expands the FDCPA beyond any precedent.

The FDCPA was enacted in 1977 to protect unsophisticated consumers from the abuses of debt collectors while not imposing unnecessary restrictions on ethical debt collectors.[5] The Seventh Circuit, in appearing to accept the mathematical "analysis", has, in essence, created an unprecedented expansion of the FDCPA. Congress, in enacting and maintaining the FDCPA, has never imposed a time limit on attorneys in conducting their reviews. The Court of Appeals ruling widely expands the FDCPA and the ruling cannot be reconciled with existing law.

Respondents' theory proposes that the federal courts and the consumer class action bar should be permitted to, in essence, "time" the collection lawyer in his decision of whether or not to issue a collection letter. If this is what Congress intended then it could have enacted a provision stating a lawyer must spend 15 minutes or so per file review. Congress did not. Again, given that the issue here involves a "bad check" with the Federal Reserve Bank's stamp it would be completely unreasonable to impose a 15 minute time requirement on such a review.

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[5] Staub v. Harris, 626 F.2d 275, 277 (3rd Cir. 1980), citing Consumer Credit Protection Act, Sen. Rep. No. 95-382, 95th Cong. 1st Sessions 1-2, reprinted in [1977] U.S. Code Cong. $& Adm. News, pp. 1695, 1969. 15 U.S.C. § 1692e.

C. THE SEVENTH CIRCUIT'S RULING UNDULY EXPANDS THE SCOPE OF THE FDCPA IN AN UNCONSTITUTIONAL MANNER AND TRAMPLES ON THE STATE'S RIGHT TO REGULATE ATTORNEYS

The Seventh Circuit's expansion of the FDCPA expands the scope of the FDCPA in an unconstitutional manner as it seeks to regulate attorneys working in their capacities as litigators. Accordingly, the expansive interpretation of the FDCPA is improper because attorneys are officers of the state courts and thus, their discipline is committed to the State Supreme Court.

The Seventh Circuit, as well as the Illinois Supreme Court, have recognized that "the power to prescribe rules governing attorney conduct and to discipline attorneys for violating those rules, rests solely in [the Illinois Supreme Court]." Lawline v. American Bar Association, 956 F.2d 1378, 1385 (7th Cir.1992), quoting People *ex rel.* Brazen v. Finley, 119 Ill. 2d 485, 494, 519 N.E.2d 898, 902 (1988). The Illinois Supreme Court has not only adopted its own disciplinary rules, but is has also appointed an Attorney Registration Disciplinary Commission to administer those rules. Lawline, 956 F.2d at 1385.

The Federal Courts should not even attempt to evaluate how much time a lawyer should spend on evaluating a bounced check. To expand the FDCPA in such a manner raises rather significant problems that impacts upon the State of Illinois' power to regulate the practice of law within the State.

If the FDCPA is to be expanded to, in effect, have the Federal Courts or Congress take over the role of regulating how much time an attorney must spend on preparing a letter than, nothing less than Constitutional issues are raised as the Tenth Amendment to the United States Constitution prohibits Congress from exercising powers over areas reserved to the states. Moreover, the Fourteenth Amendment to the United States Constitution assures Due Process.

Respondents' theory about imposing deadlines attempts to trample upon the State's right to regulate the practice of law in Illinois and affects the property rights of lawyers in their law license without Due Process. The Seventh Circuit's ruling creates confusion concerning whether the Federal Courts are now to regulate how much time a lawyer must spend on a given task. This intrusion upon the practice of law is an unprecedented expansion of Federal power.

The Illinois Supreme Court is empowered to regulate the practice of law and Respondents' theory seeks to improperly shift that function to Congress and to the Federal Courts in violation of the Tenth and Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner Norman P. Wexler, d/b/a Wexler and Wexler respectfully requests the Court issue a writ of Certoriari to the United States Court of Appeals for the Seventh Circuit, and upon full consideration, reverse the ruling of the Circuit Court as to the FDCPA and direct that judgment be entered in favor of Petitioner or remand for further proceedings.

Respectfully submitted,

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(Any footnotes trail the end of each document.)

No. 01-1809

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Birgetta A. Davis Boyd and Charlene Harrison,
Plaintiffs-Appellants,

v.

Norman P. Wexler, doing business as Wexler and Wexler,
Defendant-Appellee.

November 2, 2001, Argued

December 28, 2001, Decided

COUNSEL:
For BIRGETTA A. DAVIS BOYD, CHARLENE HARRISON, Plaintiffs - Appellants: Daniel A. Edelman, EDELMAN, COMBS & LATTURNER, Chicago, IL USA.

For NORMAN P. WEXLER, Defendant - Appellee: Michael S. Loeffler, MECKLER, BULGER & TILSON, Chicago, IL USA.

JUDGES:
Before Posner, Ripple, and Evans, Circuit Judges.

OPINIONBY:
Posner

OPINION:

Posner, Circuit Judge. This appeal from the grant of summary judgment to the defendant, a lawyer named Norman Wexler, presents questions regarding both the meaning of the Fair Debt Collection Practices Act, 15 U.S.C. § § 1692 et seq.,

and the minimum showing required to defeat a motion for summary judgment.

The Act forbids a debt collector, which Wexler is conceded to be, to "use any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, including "the false representation or implication that any individual is an attorney or that any communication is from an attorney." 15 U.S.C. § 1692e(3). A lawyer who merely rents his letterhead to a collection agency violates the Act, 15 U.S.C. § 1692j(a); Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1235-38 (5th Cir. 1997); cf. White v. Goodman, 200 F.3d 1016, 1018 (7th Cir. 2000), for in such a case the lawyer is allowing the collection agency to impersonate him. The significance of such impersonation is that a debtor who receives a dunning letter signed by a lawyer will think that a lawyer reviewed the claim and determined that it had at least colorable merit; so if no lawyer did review the claim, the debtor will have been deceived and the purpose of the Act therefore thwarted. Similarly, a lawyer who, like Wexler, is a debt collector violates section 1692e(3) (and also section 1692e(10), which forbids "the use of any false representation or deceptive means to collect or attempt to collect any debt") if he sends a dunning letter that he has not reviewed, since his lawyer's letterhead then falsely implies that he has reviewed the creditor's claim. Avila v. Rubin, 84 F.3d 222, 228-29 (7th Cir. 1996); United States v. National Financial Services, Inc., 98 F.3d 131, 135-37 (4th Cir. 1996); Clomon v. Jackson, 988 F.2d 1314, 1320-21 (2d Cir. 1993). "A debt collection letter on an attorney's letterhead conveys authority and credibility." Crossley v. Lieberman, 868 F.2d 566, 570 (3d Cir. 1989).

The plaintiffs received dunning letters signed "Wexler & Wexler," the name under which the defendant practices law. The suit charges that no lawyer in fact reviewed the claims made in the letters before they were mailed. The defendant moved for summary judgment and supported the motion with his affidavit. The affidavit states that a lawyer reviews every individual file before the initial collection letter (the letters to the plaintiffs were initial, not follow-up, letters) is sent, that he himself reviewed the plaintiffs' files before approving the

sending of collection letters to them, and that in every collection case handled by his office a lawyer "reviews each and every document in the client's file to insure the correctness of the data and the claim, paying strict attention to the various statutes of limitation which may apply . . . [and] to make sure that we comply with state requirements, such as the need for actual presence in the state, a collection agency license or a license to practice law in the state." If the lawyer approves the claim, a form letter is prepared "for review and approval [by him] before [it is] allowed to go into the mail." If "after reviewing the case file . . . the attorney is unable to verify that the client is making a valid claim, the case is pulled out and discussed with our client."

So far, so good. But pretrial discovery revealed that in a recent eight-and-a-half-month period Wexler's firm sent out 439,606 pieces of mail, which according to the deposition testimony of one of the firm's lawyers consisted overwhelmingly of collection letters. That is an average of 51,718 a month. So Wexler's firm must be large–but no, it turns out to have only three lawyers, although it has 45 other employees. Of the three lawyers, two, including the defendant, appear to be engaged in managing the firm and all three engage in normal litigation activities (Wexler's affidavit states that his firm "routinely engages in litigation with regards [sic] to collection matters"), leaving little time for them to be reviewing the routine collection activity that generates the vast bulk of the mailings. In addition, Wexler is constantly changing the form letter. We are amused (though we doubt the recipients were) by one of the variants, which Wexler dropped after being sued on account of it: "YOU ARE ABOUT TO BE TREATED IN A MANNER THAT WILL CAUSE YOU TO THINK TWICE BEFORE YOU WRITE ANOTHER WORTHLESS CHECK. OUR CLIENT HAS INSTRUCTED THAT WE NOTIFY YOU THAT YOU ARE GOING TO BE SUED UNLESS REPAYMENT IS FORTHCOMING AT ONCE." Keele v. Wexler, 149 F.3d 589, 591 (7th Cir. 1998).

Suppose that each of the three lawyers in Wexler's firm devotes four hours a day to reviewing collection files and authorizing the mailing of dunning letters and that the

process of review and authorization takes an average of 15 minutes per file. That comes to 16 collection letters a day per lawyer, which is fewer than 50 collection letters a day for all three lawyers or, assuming a five-day work week, fewer than 1,000 letters a month for the entire firm–if it is really true that each lawyer follows the review and authorization procedure set forth in Wexler's affidavit. To say the least, it is difficult to see how the firm could send out fifty times that number of letters yet still have a lawyer review the file and the letter in every one.

And it gets worse. The volume of mail sent by the firm varies from week to week, and in one particularly busy week in June 2000 the firm sent out 23,342 pieces of mail–93 times the maximum number consistent with 15-minute review. What is more, Wexler stated at his deposition that he personally is responsible for reviewing most of the collection letters; if he reviewed all of them himself, the estimate of 93 times the maximum consistent with 15-minute review would soar to 279 times. Our 15-minute estimate may be too high, but it could be cut in three, or for that matter in 15, without explaining the volume of collection letters.

The district judge, in explaining why despite this evidence he granted summary judgment for Wexler, characterized Wexler's affidavit as "uncontradicted and unrefuted." This characterization was possible only because the judge gave no weight at all to the volume of mail, stating that "mathematical inferences about the volume of letters sent are not probative of [Wexler's] state of mind." State of mind is not the issue. The issue is credibility, the truthfulness of the affidavit; Wexler might think he reviewed the two plaintiffs' files carefully yet be mistaken. Circumstantial evidence can create an issue of credibility. United States v. Arias, 238 F.3d 1, 3-5 (1st Cir. 2001); United States v. Drones, 218 F.3d 496, 504 (5th Cir. 2000); United States v. Premises Known as 717 South Woodward Street, 2 F.3d 529, 534 (3d Cir. 1993); United States v. Bouquett, 820 F.2d 165, 167 (6th Cir. 1987). Suppose a witness testifies that he saw a person draw a gun, but there is evidence that a truck was blocking the witness's line of sight. This would be circumstantial evidence that created an issue of the witness's credibility (though not necessarily of

his state of mind–he might have thought he saw a gun, but have been mistaken). And so it is here. Wexler's testimony was made incredible, or at least highly implausible, by the evidence of the volume of mail, especially when that evidence is viewed against the background of his testimony that he personally reviewed the plaintiffs' files. The letters to the two plaintiffs were mailed in February and March 2000, respectively. They are very short form letters seeking unexceptional amounts of money; there is nothing memorable about them. Wexler gave his deposition in September, almost six months later–by which time, if his affidavit can be believed, close to 100,000 additional collection matters had passed through his hands. The volume of mail not only undermines Wexler's affidavit, but is evidence from which a reasonable jury could infer that the letters to the plaintiffs were not in fact reviewed by Wexler or any other lawyer.

Wexler argues that the plaintiffs did not conduct enough discovery, that they should have broken down the 439,606 figure into initial collection letters, follow-up collection letters, and noncollection mailings (such as receipts), and should have further broken down the figure for initial collection letters between bounced-check matters, requiring minimal lawyer review, and other matters, requiring more review. We do not agree that the plaintiffs had to do this in order to create a genuine issue of material fact regarding the defendant's compliance with the Fair Debt Collection Practices Act. Remember that there is testimony by one of the firm's lawyers that the overwhelming bulk of the mailings consist of collection letters. Granted that some of them are follow-up collection letters, which require less review than initial collection letters, and bounced-check collection letters, which also may require less review than other collection letters, we do not see how these facts could be thought to put a big dent in our 15-minute estimate, which is the sort of estimate that a reasonable jury might make and from which damaging inferences concerning the veracity of Wexler's affidavit and the review of the dunning letters sent the plaintiffs by his firm arise.

Before a follow-up letter can be responsibly approved by a lawyer, he must inspect the file to determine that there has been no partial payment or other response from the debtor, and, if interest on the debt is sought by the creditor, to determine how much interest is owing. See Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872, 875-76 (7th Cir. 2000). This can be a complicated calculation. Duffy v. Landberg, 215 F.3d 871, 875 (8th Cir. 2000). In the case of a bounced-check follow-up letter, if statutory penalties are sought the lawyer must determine whether the grace period for making good on such a check has expired. See 810 ILCS 5/3-806. No doubt the initial review of a bounced-check matter takes little time, but it is hard to believe that bounced checks are so common that they could account for the bulk of these enormous mailings.

An illuminating omission from the defendant's evidence is any indication of how often, if ever, his review of a collection file leads him to refuse to approve a dunning letter and to take the matter up with the client. If this happens often, it would bolster his claim to be engaged in a process of meaningful review of clients' referrals–but it would also dramatize how little time he has to review collection files, since refusal of a referral and ensuing discussion with the client about the refusal must take more than 15 minutes. One of the other lawyers in the firm acknowledged at his deposition that "we get cases all the time where individuals claim that their checks were stolen and that there were forgeries," and he said that in each of those cases the firm would follow up, for example by sending the debtor a forgery affidavit to fill out. A lawyer would have to review the affidavit to determine whether to send a follow-up letter to the affiant.

A further difficulty with the defendant's argument that an unknown fraction of the letters are follow-up rather than initial collection letters is that in a deposition given in a similar case just a few months before his affidavit in this case, Wexler stated that if the debtor doesn't pay up after receiving the initial collection letter, the firm forthwith institutes legal proceedings unless the debtor has either died or declared bankruptcy. If this is true (it can't be–it is

unbelievable that Wexler's firm would be authorized by the client to file suit no matter how trivial the amount of the unpaid debt–but he can hardly gain a forensic benefit from making an incredible admission), there are few follow-up letters and an enormous number of legal proceedings. Those proceedings would leave the lawyers with no time to review what must be a colossal number of files.

The most practical, intuitive, and readily applied criterion for granting summary judgment is whether, if the evidence gathered in discovery were the evidence presented at trial, the party moving for summary judgment (Wexler) would be entitled to judgment as a matter of law because no reasonable jury could render a verdict for the opposing party (the two plaintiffs). E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1399 (7th Cir. 1997); Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995); Huang v. BP Amoco Corp., 271 F.3d 560, 564 (3d Cir. 2001). A reasonable jury could infer from the evidence as we have summarized it that the defendant violated the Fair Debt Collection Practices Act by rubber stamping his clients' demands for payment, thus misrepresenting to the recipients of his dunning letters that a lawyer had made a minimally responsible determination that there was probable cause to believe that the recipient actually owed the amount claimed by the creditor. A reasonable jury informed of the size of the firm and the duties of the three lawyers, which leave them little time for review of collection files, informed also of the circumstances from which an estimate can be made of the time that it takes a lawyer to review such a file with sufficient care to be able to make a responsible professional judgment that a legally collectible debt is owing, and informed finally of the enormous mass of mailings, most apparently of collection letters, in relation to the number and available time of Wexler's tiny legal staff, could rationally conclude that Wexler's claim to have reviewed these plaintiffs' files was false, that he had not reviewed them (nor had any other lawyer), and therefore that he had violated the Act. These inferences are not certain, because no matter how perfunctory the firm's normal review of creditor files and

dunning letters, it is always possible that Wexler for obscure reasons did actually review these two plaintiffs' files. But certainty of winning at trial is obviously not a precondition to getting a trial.

We need not determine in this case the minimum amount of lawyer review required to avoid misleading the debtor into thinking that a lawyer has made a responsible professional judgment about the existence of a legally enforceable debt. No reported decisions address that issue and it may not have to be resolved in this case. For if the jury believes the plaintiffs, Wexler gave their dunning letters no review at all, while if it believes Wexler, he gave it more than enough review. We say "more than enough" because the Act can be complied with by delegation of part of the review process to a paralegal or even to a computer program, see Avila v. Rubin, supra, 84 F.3d at 229-30; ABA Model Rule of Professional Conduct 5.3 (materially identical to Illinois Rule of Professional Conduct 5.3), provided the ultimate professional judgment concerning the existence of a valid debt is reserved to the lawyer. Avila v. Rubin, supra, 84 F.3d at 225, 229; Clomon v. Jackson, supra, 988 F.2d at 1317, 1321. "An attorney's signature implies the attorney has formed a professional judgment about the debtor's case." Avila v. Rubin, supra, 84 F.3d at 229; see ABA Model Rule of Professional Conduct Rule 5.5(b) and comment 1 (materially identical to Illinois Rule of Professional Conduct 5.5(b)). In an age of specialization, professionals are not to be criticized for identifying subroutines that paraprofessionals can adequately perform under a professional's supervision. But Wexler does not argue that he has delegated some of the review tasks (for example, ascertaining whether the amount of the claim submitted by the client is the same as the amount that appears on the form letter prepared by the nonlawyer collection agents whom Wexler employs) to nonlawyers; he argues that he performs all these tasks himself, implying that if he is not telling the truth, no one performs them. We can leave for a future case the determination of the point at which delegation is so extensive or review so perfunctory that the lawyer's supposed authorship of the dunning letter becomes a deception, not because there was no review but because it

was too meager to be meaningful. We are not suggesting a 15-minute minimum; we used that assumption merely to illustrate that a rational jury might find, given the volume of mail, that it was unlikely that Wexler had actually reviewed the plaintiffs' files before authorizing dunning letters to be sent to them.

Reversed.

No. 00 C 2555

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BIRGETTA A. DAVIS BOYD and CHARLENE HARRISON,
Plaintiffs,

v.

NORMAN WEXLER, doing business as
WEXLER AND WEXLER,
Defendant.

November 17, 2000, Decided

November 21, 2000, Docketed

COUNSEL:
For BIRGETTA A DAVIS BOYD, CHARLENE HARRISON, plaintiffs: Cathleen M. Combs, Daniel A. Edelman, James O. Latturner, Adam M. Berger, Edelman, Combs & Latturner, Chicago, IL.

For NORMAN P WEXLER, defendant: Michael S. Loeffler, Robert Paul Norman, John Edward DeLascio, Julie L Trester, Meckler, Bulger & Tilson, Chicago, IL.

JUDGES:
Ruben Castillo, United States District Judge.

OPINIONBY:
Ruben Castillo

OPINION:

MEMORANDUM OPINION AND ORDER

In this class action, Plaintiffs Birgetta A. Davis Boyd and Charlene Harrison allege that Defendant Norman Wexler violated the Fair Debt Collection Practices Act ("FDCPA" or

"Act"), 15 U.S.C. § § 1692e(3)&(10). Plaintiffs' allegations stem from letters sent to them by Wexler on behalf of creditor-clients. Plaintiffs contend that these letters falsely represent that Wexler was acting in a professional capacity as an attorney in attempting to collect debts allegedly owed by Plaintiffs. Presently before the Court is Wexler's Motion for Summary Judgment. For the reasons that follow, the motion is granted.

RELEVANT FACTS [n1]

Wexler is an attorney licensed to practice law in the State of Illinois. Wexler practices at the law firm of Wexler & Wexler, where one of his responsibilities is the collection of debts for various creditor-clients. Wexler & Wexler employs three attorneys and approximately forty-five non-attorneys.

Plaintiff Harrison resides in Chicago, Illinois. In February 2000, Wexler sent a letter, on Wexler & Wexler letterhead, to Harrison (the "Harrison letter") seeking to obtain payment owed to its client, Empress Casino Joliet Corp. [n2]

Plaintiff Boyd also resides in Chicago, Illinois. In March 2000, Wexler sent a letter, on Wexler & Wexler letterhead, to Boyd (the "Boyd letter") seeking to obtain payment owed to another client, Future Finance Company. [n3]

Wexler & Wexler has a process in place to handle all debt collection matters, including those related to Plaintiffs, referred to the firm by creditor-clients. (Id. at P 5.) First, the creditor-client sends either a hard copy or an electronic file of the debtors' file to Wexler & Wexler. (Id.) The file is then sent to data entry at Wexler & Wexler, where a batch report is created. (Id.) The internal paperwork is given to the reviewing attorney along with any additional material received from the client, and the attorney reviews each document in the file. (Id.) The reviewing attorney documents his review of the file on a log sheet. (Id.) In addition, the reviewing attorney reviews and approves any letter before it is mailed and retains the discretion to decide whether to send out a collection letter at all. (Id. at PP 5, 7.) Accordingly, prior to sending the letters at issue in this case, Wexler reviewed Plaintiffs' file materials, determined that the debts were valid,

and recommended that each Plaintiff be sent a collection letter. (R. 14, Def.'s Statement of Facts, Ex. A at P 6.)

Wexler & Wexler uses a mail sort service, Mail Sort, Inc., to pick up, sort, and send its mail. (R. 18, Pls.' Resp. to Def.'s Statement of Facts at P 4.) Between January 3, 2000 and September 15, 2000, Wexler & Wexler sent out 439,606 pieces of mail through Mail Sort, Inc., an overwhelming portion of which consisted of collection letters. (Id).

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue for trial exists only when "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The court must view the evidence in a light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 150 (7th Cir. 1994). However, if the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50.

II. FDCPA Claims

Congress enacted the FDCPA in 1977 "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). To this end, § 1692(e) of the Act provides, inter alia, that

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

...

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

...

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

The Seventh Circuit evaluates communications from debt collectors "through the eyes of an unsophisticated consumer." Jang v. A.M. Miller & Assocs., 122 F.3d 480, 483-84 (7th Cir. 1997); Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996). The unsophisticated consumer is a hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading. Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994). This standard presumes a level of sophistication that "is low, close to the bottom of the sophistication meter," Avila, 84 F.3d at 226, and "'protects the consumer who is uninformed, naive, or trusting,'" Jang, 122 F.3d at 483-84 (citing Gammon, 27 F.3d at 1257). Still, the standard "admits an objective element of reasonableness," which "protects debt collectors from liability for 'unrealistic or peculiar interpretations of collection letters.'" Id.

With these standards in mind, we now turn to Wexler's motion for summary judgment.

ANALYSIS

I. Plaintiffs'§ 1692e(3) Claims

A. Wexler's Participation and Involvement in the Debt Collection Process

Plaintiffs claim that Wexler violated § 1692e(3) by sending the debt collection letters to them. They argue that, although Wexler had no meaningful involvement in the preparation or investigation of the accounts on which he was attempting to collect, he falsely represented in his letters that he was acting in his professional capacity as an attorney.

Wexler responds that he was directly and personally involved in reviewing Plaintiffs' files and sending debt collection letters to them and, thus, complied with the FDCPA.

Sending a communication to a debtor falsely representing that an individual is an attorney, or that the communication is from an attorney violates § 1692e(3). Congress did not write into the Act a provision requiring a specific, minimum level of involvement by an attorney sending debt collection letters, and this Court declines to do so now. Rather, this Court will adhere to the guidelines set forth by the Seventh Circuit in Avila. In Avila, the court held that § 1692e requires "direct and personal involvement" by an attorney sending debt collection letters. Avila, 84 F.3d at 228. The court explained that personal involvement "may include reviewing the file of individual debtors to determine if and when a letter should be sent or approving the sending of letters based on the recommendations of others." Id. A lawyer may not simply act as a rubber stamp when it comes to sending collection letters on behalf of creditor-clients. Rather, a lawyer must at least pass upon and approve correspondence that purports to come from him. 84 F.3d at 229.

Wexler has established that he was directly and personally involved in collecting debts from Plaintiffs, and that Wexler & Wexler follows detailed debt collection procedures. First, it is undisputed that Wexler reviewed Plaintiffs' file materials, determined that Plaintiffs' debts were valid, and recommended that Plaintiffs receive collection letters. Second, it is undisputed that Wexler & Wexler has a process in place to handle the debt collection matters referred to them by creditor-clients, including the matters relating to Plaintiffs. As part of this process, Wexler & Wexler receives a copy of the debtor's file from the creditor-client, creates a batch report, sends the internal paperwork, along with any additional material received from the client, to the reviewing attorney, and the attorney reviews each document in the file. The attorney then documents his review of the file on a log sheet. Thus, Wexler & Wexler attorneys review and approve all letters before they are mailed and retain the discretion to decide whether to send out a collection letter at all.

Plaintiffs argue that Wexler "misrepresents the amount of attorney involvement in [his] debt collection efforts," (R. 17, Pls.' Br. in Opp'n to Def.'s Mot. Summ. J. at 7), and that his involvement is limited to the approval of form collection letters, (id. at 9). However, Plaintiffs fail to support this argument with sufficient evidence to create a genuine issue of fact regarding either Wexler's direct and personal involvement in sending the collection letters to Plaintiffs or Wexler & Wexler's debt collection practices.

Plaintiffs attempt to attack Wexler and his law firm's involvement in the debt collection process by establishing that between January 3, 2000 and September 15, 2000, Wexler & Wexler mailed out 439,606 pieces of mail, which overwhelmingly consisted of collection letters. From this figure, Plaintiffs compute that each of the attorneys at Wexler & Wexler would have had to review nearly 900 letters each day, and would have been able to spend only seconds on each file. Plaintiffs argue, therefore, that "it is obvious that no meaningful attorney involvement could possibly exist in the production and mailing of these letters." (Pls.' Br. in Opp'n to Def.'s Mot. Summ. J. at 10-11.) The Court is sympathetic to Plaintiffs' claims that Wexler and the attorneys at Wexler & Wexler do not spend as much time on each individual debtor file as they ideally should. Yet, it must be noted that the quality of Wexler's law practice is not the issue. The issue is whether Wexler's letters were inherently deceptive because of a lack of meaningful attorney involvement. The evidence presented by Plaintiff simply is not sufficiently probative to create a genuine issue of material fact to dispute Wexler's evidence that he was directly and personally involved in reviewing Plaintiffs' files and sending the collection letters to them.

Plaintiffs mistakenly rely on Avila, 84 F.3d 222, Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993), Nielsen v. Dickerson, 1999 U.S. Dist. LEXIS 13931, No. 98 C 5909, 1999 WL 754566 (N.D. Ill. Sept. 9, 1999), and Nance v. Friedman, 2000 U.S. Dist. LEXIS 19907, No. 98 C 6720, 2000 WL 1230462 (N.D. Ill. Aug. 28, 2000) to support their position. These cases are easily distinguished from the case at bar. First, both the Avila and Clomon courts found that the attorney who purportedly

was involved in sending the debt collection letters did not review debtors' file, did not determine when particular letters should be sent, did not approve the sending of particular letters based on the recommendation of others, did not see particular letters before they were sent, and did not know the identities of the persons to whom the letters were sent. Avila, 84 F.3d at 228-229; Clomon, 988 F.2d at 1320. Both courts found that the respective letters, which purported to come from attorneys, were false and misleading because they did not involve attorney review in any meaningful sense. Avila, 84 F.3d at 229; Clomon, 988 F.2d at 1320. By contrast, Wexler reviewed Plaintiffs' files, knew Plaintiffs' identities, determined that Plaintiffs' debts were valid, and made an independent determination that collection letters should be sent to each of them.

For similar reasons, Plaintiffs' reliance on Nielsen also is misplaced. In Nielsen, the creditor-client did not forward the entire file for each debtor to the attorney, and the attorney's role merely was to check the letters "for incorrect amounts and typographical errors." Nielsen, 1999 WL 754566, at *3. Moreover, the attorney did not review any debtor letters prior to their transmittal. Id. at *4. Unlike Nielsen, the attorneys at Wexler & Wexler review debtors' files and collection letters before they are sent. Furthermore, Wexler & Wexler attorneys retain the discretion to refrain from sending out debt collection letters under the appropriate circumstances.

Finally, although the facts in Nance are similar to those in the case at bar, in Nance, the court found that there was a genuine factual issue as to whether the attorney reached a considered, professional judgment that the debtor was delinquent and a candidate for legal action, and therefore denied defendant's motion for summary judgment on the plaintiff's § 1692e(3) claim. Id. at *3. By contrast, in the case at bar, we find that Wexler has presented undisputed evidence that, after reviewing the Plaintiffs' files, he reached a considered professional judgment that Plaintiffs' debts were valid, and that Plaintiffs should be sent debt collection letters. Wexler is therefore entitled to summary judgment on Plaintiffs' § 1692e(3) claims. See e.g., Anthes v. Transworld Sys., Inc., 765 F. Supp. 162 (D. Del. 1991) (granting summary

judgment in favor of the defendant on plaintiff's § 1692e(3) claim where the attorney reviewed the materials provided by his client and independently determined whether a collection letter should be sent).

B. Mass Mailings

Plaintiffs claim that the letters Wexler sent to them are form letters that Wexler & Wexler mass mails to debtors in violation of the FDCPA. We disagree. Aside from the number of letters that Wexler & Wexler sent out through Mail Sort, Inc. between January and September of 2000, the only additional evidence that Plaintiffs offers in support of their contention is that "on each of these mass produced letters 'there is a firm signature' that is not manually signed by an attorney." (R. 17, Pls.' Br. in Opp'n to Def.'s Mot. Summ. J. at 11.)

The issue, however, is not who signed a letter, or how it was produced, but rather whether it falsely represents or implies that it came from an attorney when in fact it did not. 15 U.S.C. § 1692e(3). As noted above, the Court finds that Wexler was directly and personally involved in sending the letters to Plaintiffs. The fact that the letters were signed with the law firm's name, i.e. "Sincerely, Wexler & Wexler," instead of being manually signed by an attorney does not change this result. (R. 17, Pls.' Br. in Opp'n to Def.'s Mot. Summ. J. Ex. D, Wexler Sept. 8, 2000 Dep. at 31.)

II. Plaintiffs' 1692e(10) Claims

Plaintiffs' claim that Wexler violated § 1692e(10) is based on the same grounds on which Plaintiffs base their § 1692e(3) claim. Section 1692e(10) prohibits "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10). A close examination of the Harrison and Boyd letters, when considered through the eyes of an unsophisticated consumer, reveals nothing inherently misleading or deceptive. Therefore, because Plaintiffs offer no additional evidence in support of their § 1692e(10) claims, for the same reasons this Court finds that Wexler did not

violate § 1692e(3), we likewise find that Wexler did not violate § 1692e(10). See Mizrahi v. Network Recovery Servs., Inc., No. 98-CV-4528(ERK)(JLC), 1999 WL 33127737 (E.D.N.Y. Nov. 5, 1999) (where there is no violation of § 1692e(3) and (5), plaintiff's 1692e(10) claim, which is based on the same facts, likewise lacks merit). Accordingly, Wexler's motion is granted as to Plaintiffs' § 1692e(10) claims as well.

CONCLUSION

For these reasons, we grant Defendant's Motion for Summary Judgment (R. 13-1) in full. The Clerk of the Court is instructed to enter judgment, pursuant to Federal Rule of Civil Procedure 58, in favor of Defendant.

Entered:

Ruben Castillo

United States District Judge

Date: November 17, 2000

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the defendant Norman P. Wexler d/b/a Wexler & Wexler and against plaintiffs Birgetta A. Davis Boyd and Charlene Harrison.
This cause of action is dismissed in its entirety. There being no just reason for delay, this is a final and appealable order.

Date: 11/20/2000

Footnotes

n1 The facts are derived from statements that the parties filed with this Court under Northern District of Illinois' Local Rule 56.1.

n2 The body of the Harrison letter states as follows:

Our Client: EMPRESS CASINO JOLIET CORP.
Our File # : 6285046
Amount Claimed: $ 500.00

Your unpaid bill to our client has been referred to this firm to enforce collection. This debt is long past due.

Unless you notify our office within 30 days after receipt of this letter that the validity of this debt, or any portion of it, is disputed, we will assume that the debt is valid. If you do notify us of a dispute, we will obtain verification of the debt and mail it to you. Also, upon your written request within 30 days, we will provide you with the name and address of the original creditor if it is different than what is shown above. This letter is an attempt to collect a debt, and any information obtained will be used for that purpose.

Kindly remit in full. Please remit all payments to this office.

Very truly yours.

WEXLER & WEXLER

WW/A1

If you need to contact this office by telephone to discuss this matter, you may call Tim Austin at extension # 538.

02/12/1998.

(R. 18, Pls.' Statement of Facts, Ex. B.)

n3 The body of the Boyd letter states as follows:

Our File # : 6[]46677
Total Claimed: $ 4235.92
If this is a dishonored check, then the following items are included in the total claimed listed above:
Check(s) Amount: $ 4235.92
Store Contract Charge: $ .00
Statutory Check Fee: $
Check No. & Date:

02/27/1997

Recently, we wrote to you about your long over due debt to our client, FUTURE FINANCE COMPANY.

We have not as yet received your payment nor have we heard from you as to why payment has not been forthcoming. No further delays can be tolerated, you must send us payment in full by return mail or in the alternative contact this office immediately to resolve any problems.

Please cooperate with our request. This letter is an attempt to collect a debt and any information obtained may be used for that purpose.

Please remit all payments to this office.

Very truly yours,

WEXLER & WEXLER

WW/AT2
12/15/1999

If you need to contact this office by telephone to discuss this matter, you may call Tim Austin at extension 538.

(R.18, Pls.' Statement of Facts, Ex. A.)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ruben Castillo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	00 C 2555	DATE	3/5/2001
CASE TITLE	Birgetta A. Davis Boyd, et al. vs. Norman P. Wexler		

DOCKET ENTRY:

■ [Other docket entry] Enter Memorandum Opinion and Order. Plaintiffs' motion for reconsideration of the 11/20/00 ruling [25-1] is denied.

■ [For further detail see order attached to the original minute order.]

√ Docketing to mail notices.

01 MAR-5 PM 4:01
Date/time received in
central Clerk's Office

2
number of notices

MAR 06 2001
date docketed

docketing deputy initials

MAR 06 2001
date mailed notice

mailing deputy initials

Document Number
30

No. 00 C 2555

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BIRGETTA A. DAVIS BOYD and CHARLENE HARRISON,
Plaintiffs,

v.

NORMAN WEXLER, doing business as
WEXLER AND WEXLER,
Defendant.

November 17, 2000, Docketed

MEMORANDUM OPINION AND ORDER

Class action Plaintiffs Birgetta A. Davis Boyd and Charlene Harrison charged Defendant Norman P. Wexler with violating the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §§ 1692(e) & (10). Plaintiffs claimed that Wexler falsely represented that he was acting in his professional capacity as an attorney when he sent debt collection letters to them. Plaintiffs now ask this Court to reconsider its order awarding summary judgment to Wexler. We deny the motion to reconsider for the following reasons.

RELEVANT FACTS

Plaintiffs each received debt collection letters sent by Wexler, an attorney who practices law at Wexler & Wexler, on behalf of various creditor-clients. In their class action lawsuit, Plaintiffs claimed that Wexler violated the FDCPA because he falsely represented in his letters that he was acting as an attorney, even though he was not meaningfully involved with investigating or preparing their individual accounts. Wexler moved for summary judgment on his sworn deposition testimony that he was directly and personally involved in reviewing Plaintiffs' files and sending collection letters to

them. In response, Plaintiffs submitted data from the mailing company used by Wexler & Wexler that shows the volume of all letters mailed by the law firm over a several month period. Dividing the total number of letters mailed by the number of working hours in a day, Plaintiffs concluded that Wexler could not possibly have reviewed each individual file and collection letter he sent. Plaintiffs did not present any other affirmative evidence challenging Wexler's testimony.

LEGAL STANDARDS

I. Motion to Reconsider

Courts recognize motions to reconsider under Fed. R. Civ. P. 59(e). Motions for reconsideration serve only to correct manifest errors of law or fact or to present newly discovered evidence. Caisse Nationale de Credit Agricole v. CBI Indus., 90 F.3d 1264, 1269 (7th Cir.

1996). They do not permit parties to "rehash" old arguments or submit hovel legal theories. In re Oil Spill by the "Amoco Cadiz, " 794 F. Supp. 261, 267 (N.D. Ill. 1992), aff'd 4 F.3d 997 (7th Cir. 1993) (unpublished), The Seventh Circuit observed that a motion for reconsideration performs a valuable function where "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.... Such problems rarely arise and the motion to reconsider should be equally rare." Bank of Waunakee v. Rochester Cheese Sales, Inc. , 906 F.2d 1185, 1191 (7th Cir. 1990).

Parties should not routinely file motions to reconsider as a reaction to unfavorable decisions. "This Court, just like the National Football League, has done away with the concept of 'instant replay.'" Jefferson v. Sec. Pac. Fin. Servs., Inc., 162 F.R.D. 123, 125 (N.D. Ill 1995). Unless parties can reasonably argue that the Court made a manifest error of law, misapprehended the facts or that the law has changed, their energies would be better spent pursuing their arguments on

appeal. As we have previously stated, filing a motion to reconsider should not be a "Pavlovian Response" to an adverse ruling. See, e.g., Cal. Union Ins. Co. v. Liberty Mut. Ins. Co., 930 F. Supp. 317, 319 (N.D. Ill. 1996).

II. Summary Judgment

Summary judgment is appropriate if the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue for trial exists only when "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must view the evidence in a light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 150 (7th Cir. 1994). However, if the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50.

ANALYSIS

Plaintiffs in this case have not satisfied the legal standards for reconsideration. They do not present new evidence, and they fall to demonstrate a manifest error of law, a change in the law or a misapprehension of the facts. Instead, Plaintiffs simply reassert allegations made in their pleadings and stubbornly rely on a mathematical inference to create a triable issue of fact.

In their motion to reconsider, Plaintiffs argue that This Court made a manifest error by resolving an issue of credibility. They allege that the sheer volume of letters sent by Wexler & Wexler over the span of several months must indicate that Defendant lied in his deposition when he stated that he was directly and personally involved with the sending of each letter. Plaintiffs set forth no other affirmative or newly discovered evidence to support their allegation. For the reasons that follow, we find Plaintiffs' mathematical

calculation alone insufficient to establish a triable issue of fact.

As the nonmoving party, Plaintiffs carry the burden of producing "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 5 6(e); Matsushita Elec. Indus. Co. v. Zenith Radio Co., 475 U.S. 574, 586 (1986). They cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit to that effect See Liberty Lobby, 477 U.S. at 256-57. In their attempt to concoct an issue of credibility, Plaintiffs maintain that circumstantial evidence, in the form of their mathematical calculation of letter volume and working hours, is sufficient to give rise to a triable issue of fact. Plaintiffs are mistaken. Issues of credibility only defeat summary judgment "[w]here an issue of material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility." Fed. R. Civ. P. 56(e) advisory committee note; Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 130 (3d Cir. 1998).

In this case, we based our decision to award summary judgment for Wexler on his uncontradicted and unrefuted testimony that he directly and personally reviewed Plaintiffs' files, reached a considered professional judgment that Plaintiffs' debts were valid and exercised discretion in deciding that Plaintiffs should be sent debt collection letters. We did not need to reach a decision regarding Wexler's credibility then, and we decline to do so now. Plaintiffs' mathematical inferences about the volume of letters sent are not probative of Wexler's state of mind and cannot give rise to an issue of credibility simply because they present an alternative theory. We reiterate that Plaintiffs did not submit any affirmative evidence directly contradicting Wexler's testimony that he participated meaningfully in the sending of Plaintiffs' debt collection letters despite having ample opportunity to obtain discovery on this very issue.

Drawing the most favorable inference from Plaintiffs' letter volume calculations, we can conclude that Wexler may have spent only a small amount of time on each individual

account. However, the FDCPA does not specify, and no other court has yet defined, a minimum amount of time a lawyer must spend with each individual file to establish meaningful attorney involvement under the Act. Instead, courts proceed much like the Seventh Circuit in Avila, examining all the available evidence to determine whether a lawyer was "acting like a lawyer usually acts, directly control[ing] or supervis[ing] the process through which the letter was sent." Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996). The undisputed evidence before the Court established that Wexler met the Avila standard because he was "acting like a lawyer" in sending debt collection letters to Plaintiffs. Plaintiffs' attempt to recast their letter volume calculation as circumstantial evidence creating a triable issue of fact neither presents newly discovered evidence nor demonstrates a manifest error by this Court.

CONCLUSION

For these reasons, we deny Plaintiffs' motion to reconsider our decision awarding summary judgment for Defendant. (R. 25-1.)

Entered:

Judge Ruben Castillo
United States District Court

Dated; March 5, 2001

No. 01-1809

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Birgetta A. Davis Boyd and Charlene Harrison,
Plaintiffs-Appellants,

v.

Norman P. Wexler, doing business as Wexler and Wexler,
Defendant-Appellee.

April 18, 2002

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 00 C 2555

Ruben Castillo, Judge.

Before Hon. Richard A. Posner, Circuit Judge; Hon. Kenneth F. Ripple, Circuit Judge and Hon. Terence T. Evans, Circuit Judge.

ORDER

On January 10, 2002 defendant-appellee filed a petition for rehearing and petition for rehearing en banc. All the judge on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore DENIED.